



March 18, 2009

D.C. Circuit Finds No “Injury” To State When FERC Conditionally Authorizes LNG Terminal Prior to State Regulatory Approval

In a March 13, 2009, decision, *Delaware Department of Natural Resources and Environmental Control v. FERC*,¹ the United States Court of Appeals for the District of Columbia Circuit dismissed a petition for review of Federal Energy Regulatory Commission (FERC) orders conditionally authorizing a liquefied natural gas (LNG) import terminal on the ground that the petitioner, the Delaware Department of Natural Resources and Environmental Control (Delaware) suffered no cognizable injury and, therefore, lacked standing to challenge the FERC orders. In so doing, the court rejected the notion that “FERC lacked statutory authority to issue a conditional order, even if that condition preserved Delaware’s right to veto the project.”

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Delaware was challenging FERC orders conditionally granting an application by Crown Landing LLC (Crown Landing), a wholly-owned subsidiary of BP America Production Company, for authorization under Section 3 of the Natural Gas Act (NGA)² to site, construct, and operate an LNG import terminal near the mouth of the Delaware River.³ In addition to the NGA, the case involved two other federal statutes: the Coastal Zone Management Act (CZMA) and the Clean Air Act (CAA). The CZMA and CAA mandate that federal licensing authorities ensure compliance by proposed projects with relevant state based environmental programs. Specifically, the CZMA states that “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification.”⁴ The CAA contains similar language.⁵

Delaware argued before the D.C. Circuit that, in conditionally approving Crown Landing’s application under Section 3 of the NGA, FERC had granted a license or permit without the state concurrence required by the CZMA and CAA. Accordingly, it contended that FERC lacked statutory authority to issue its conditional order regarding Crown Landing before Delaware had an opportunity to block the project. The D.C. Circuit agreed that the



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merits of the case turned on whether FERC's conditional approval order constitutes a "license or permit" within the meaning of the CZMA and CAA. Because it dismissed the petition for lack of standing, however, the D.C. Circuit never reached the merits of the case.

In finding that Delaware lacked standing to bring the case, the D.C. Circuit stated that it was "unable to see how FERC's allegedly illegal procedure causes Delaware any injury in light of FERC's acknowledgement of Delaware's power to block the project." The court understood Delaware to be concerned that FERC's conditional approval will increase political pressure on Delaware to reverse its earlier order rejecting the project, but said it "could hardly recognize this conjectural political dynamic as representing a concrete injury or, indeed, any sort of legally-cognizable injury." It characterized Delaware as asking the D.C. Circuit "to prevent it from changing its own mind."

Although decided purely on the issue of standing, the court's decision, in effect, affirms FERC's approach of granting conditional approval prior to state regulatory approval. While the conditions in this case prevent Crown Landing from commencing construction until it obtains state approvals, the court appeared to leave open the possibility that FERC might be permitted to go a step further, noting that, "[i]t is not apparent that even if FERC allowed construction to move forward" based on a decision of the Secretary of Commerce reversing Delaware's CZMA determination that "Delaware would have standing based only on their procedural . . . theory."⁶

¹ *Del. Dept. of Natural Res. and Envtl. Control v. FERC*, No. 07-1007 (D.C. Cir. Mar. 13, 2009) (order dismissing petition for review).

² 15 U.S.C. § 717b (2006).

³ Onshore portions of the terminal were to be located in New Jersey, but a pier for the unloading of tankers would have extended into submerged lands that are subject to Delaware's jurisdiction. The issue of jurisdiction over those submerged lands was litigated before the Supreme Court in a case decided last year. *See New Jersey v. Delaware*, 128 S.Ct. 1410 (2008).

⁴ 16 U.S.C. § 1456(c)(3)(A) (2006).

⁵ *See* 42 U.S.C. § 7506(c)(1) (2006).

⁶ Decisions made under the CZMA are appealable to the Secretary of Commerce. In this instance, the D.C. Circuit was referring specifically to FERC allowing construction to move forward following a decision recognizing an intervention by the Secretary of Commerce.